Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24C-60–05 OF 2019
WONG KIAN KHEONG J
26 DECEMBER 2019

Building and Construction Law — Construction contract — Adjudication — Originating summons to set aside adjudication decision under Construction Industry Payment Adjudication Act 2012 — Whether court can set aside adjudication decision — Whether adjudicator acted independently or impartially — Whether there was denial of natural justice — Whether adjudicator exceeded his jurisdiction — Construction Industry Payment Adjudication Act 2012 s 15 — Rules of Court 2012 O 92 r 4

The plaintiff had filed an originating summons ('OS') against the defendant seeking to set aside an adjudication decision made on 5 April 2019 ('the AD'). The plaintiff was the main contractor of a construction project ('project'). The plaintiff appointed the defendant as the nominated subcontractor for certain works in the project ('subcontract works'). The defendant had initiated adjudication proceedings against the plaintiff following a dispute between the plaintiff and defendant regarding the sub-contract works. The issues raised in the OS were: (a) whether the court may set aside the AD under O 92 r 4 of the Rules of Court 2012 ('the RC'); and (b) whether the adjudicator had acted independently and/or impartially under s 15(c) of the Construction Industry Payment Adjudication Act 2012 ('the CIPAA') when: (i) the adjudicator accepted the defendant's bare averment that the plaintiff's failure to schedule work of subcontractors had caused the defendant's non-completion of works; (ii) the adjudicator had decided that the plaintiff was not entitled to deduct 'agreed back charges' ('back charges') despite the fact that the plaintiff had produced an invoice and two delivery receipts to support the back charges; and (iii) the adjudicator had held that the plaintiff was not entitled to withhold the performance bond and the retention sums despite the defendant's failure to complete the works and the defects in the defendant's works; (c) whether there was a denial of natural justice under s 15(b) of the CIPAA; (d) whether the adjudicator had exceeded his jurisdiction within the meaning of s 15(d) read with s 27(1) of the CIPAA when the adjudicator decided in the manner he did; and/or awarded multiple pre-AD interest under s 25(o) of the CIPAA; and (e) if the adjudicator had exceeded his jurisdiction by awarding the fourth pre-AD interest sum, whether the court has the power under s 15 of the CIPAA to: (i) vary the AD (by excluding the fourth pre-AD interest sum; or (ii) sever the

fourth pre-AD interest sum from the AD and set aside only the fourth pre-AD interest sum. A

Held, allowing the originating summons:

(1) An AD was provisional under s 13(a)–(c) of the CIPAA and may be set aside by the High Court pursuant to any of the paragraphs in s 15(a)–(d) of the CIPAA. A setting aside application was not an appeal to the High Court against the AD. Nor was a setting aside application a judicial review of the AD. The High Court cannot review the merits of an AD in a setting aside application as it is not an appeal nor is it a judicial review of the AD. There cannot be any resort to O 92 r 4 of the RC, the court's inherent jurisdiction and/or inherent power in light of the specific provision in s 15(a)–(d) of the CIPAA (see para 14). B C

(2) The court was unable to accept the contentions by the plaintiff to set aside the AD under s 15(c) of the CIPAA because it would be tantamount to a review of the merits of the AD and that the OS will be wrongly converted into an appeal or rehearing of the merits of the dispute. Further, the contentions did not amount to any proof of the two limb in s 15 as it did not that the adjudicator was not independent or was biased in the conduct of the adjudication and the delivery of the AD (see paras 17–18). D E

(3) The plaintiff had not proven that the adjudicator has breached the first and/or second rule of natural justice as: (a) the plaintiff has not adduced any evidence of bias on the part of the adjudicator; (b) before making the AD the adjudicator had not deprived the plaintiff of its right to adduce evidence and to submit on any issue which arose in the adjudication proceedings; (c) the adjudicator had considered and rejected the three contentions; and (d) even if the adjudicator had breached the second rule of natural justice, there is no evidence that such breach is decisive or material to the AD which warrants the court to set aside the AD pursuant to s 15(b) of the CIPAA. Therefore, the court cannot allow the OS under s 15(b) of the CIPAA (see paras 20–22). F G

(4) Based on the defendant's payment claim and adjudication claim, the adjudicator had exceeded his jurisdiction under s 27(1) read with ss 5(1) and 15(d) of the CIPAA by awarding the fourth pre-ad interest sum. The adjudicator had already granted the first to third pre-AD interest sums. An award of the fourth pre-AD interest sum by the adjudicator, will result in an unjust enrichment of the defendant (see para 29.) H I

(5) In the event two applications are to be decided together by the court being an application to enforce the AD under s 28 of the CIPAA and an application to set aside an AD pursuant to s 15 of the CIPAA, the court has the power to make an order to enforce only a part of an AD, in which

A the court varies the AD so as to only enforce a part of the AD and in that event, the court must dismiss the setting aside application. In the event the court is only dealing with an application to set aside the AD, the court has no power to set aside part of the AD under s 15, if parliament had intended for the court to have power to vary or to set aside the AD, parliament would have expressly provided for such power in s 15 (see paras 35 & 37–38).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu saman pemula ('SP') terhadap defendan untuk mengetepikan satu keputusan adjudikasi yang dibuat pada 5 April 2019 ('KA'). Plaintif merupakan kontraktor utama dalam satu projek pembinaan ('projek'). Plaintif telah melantik defendan sebagai calon subkontraktor untuk kerja tertentu dalam projek tersebut ('kerja subkontrak'). Defendan telah memulakan prosiding adjudikasi terhadap plaintif lanjutan satu pertikaian antara plaintif dan defendan berkenaan dengan kerja subkontrak. Isu yang dibangkitkan dalam SP tersebut adalah: (a) sama ada mahkamah boleh mengetepikan KA dibawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'); (b) sama ada pengadil telah bertindak secara bebas dan/atau saksama dibawah s 15(c) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') apabila: (i) pengadil menerima pengataan kosong defenden bahawa kegagalan plaintif untuk menjadualkan kerja subkontraktor telah menyebabkan defendan gagal untuk melengkapkan kerja; (ii) pengadil telah memutuskan bahawa plaintif tidak berhak untuk menolak 'caj kebelakang yang dipersetujui' ('caj kebelakang') walaupun fakta bahawa plaintif telah mengemukakan satu invois dan dua akuan penghantaran untuk menyokong caj kebelakang tersebutl; dan (iii) pengadil telah memutuskan bahawa plaintif tidak berhak untuk tidak menyerahkan bon pelaksanaan dan jumlah yang dikekalkan tanpa walaupun defendan gagal untuk melengkapkan kerja dan kecacatan dalam kerja defendan; (c) sama ada wujud penafiaan keadilan asasi dibawah s 15(b) Akta; (d) sama ada pengadil telah melampaui bidang kuasanya dibawah makna s 15(d) dibaca bersama s 27(1) Akta apabila pengadil membuat keputusan sepertimana yang dilakukannya; dan/atau memberi beberapa awad faedah pra-KA dibawah s 25(o) Akta; dan (e) sama ada pengadil telah melebihi bidangkuasanya apabila memberi awad jumlah faedah pra-KA keempat, sama ada mahkamah mempunyai kuasa dibawah s 15 Akta untuk: (i) menukar KA (dengan mengecualikan jumlah faedah pra-KA keempat; atau menolak faedah pra-KA keempat daripada KA dan hanya mengetepikan jumlah faedah pra-KA keempat.

Diputuskan, membenarkan OS:

(1) Satu KA adalah sementara dibawah s 13(a)–(c) Akta dan boleh diketepikan oleh Mahkamah Tinggi selaras dengan mana-mana perenggan dalam s 15(a)–(d) Akta. Satu permohonan untuk

mengetepikan bukanlah satu rayuan ke Mahkamah Tinggi terhadap KA. Permohonan untuk mengetepikan bukan juga satu semakan kehakiman KA. Mahkamah Tinggi tidak boleh menyemak merit KA dalam permohonan untuk mengetepikan kerana ianya bukan satu rayuan ataupun semakan kehakiman KA. Tidak boleh ada apa-apa kebergantungan kepada A 92 k 4 KKM, bidangkuasa dan/atau kuasa sedia ada mahkamah mengambil kira peruntukan spesifik s 15(a)–(d) CIPAA (lihat perenggan 14).

(2) Mahkamah tidak boleh menerima hujahan plaintif untuk mengetepikan KA dibawah s 15 Akta kerana ianya akan terjumlah kepada satu semakan merit KA dan SP tersebut akan secara salah digantikan kepada satu rayuan atau pendengaran semula merit pertelingkahan tersebut. Lanjutan itu, hujahan tersebut tidak terjumlah kepada apa-apa pembuktian dua cabang dalam s 15 kerana ianya tidak menunjukan bahawa pengadil tersebut tidak bebas atau bias dalam menjalankan adjudikasi dan memberikan KA (lihat perenggan 17–18).

(3) Plaintif tidak membuktikan bahawa pengadil telah melanggar peraturan pertama dan/atau kedua keadilan asasi kerana: (a) plaintif tidak mengemukakan apa-apa keterangan bias pada pihak pengadil; (b) sebelum membuat KA, pengadil tidak menghalang plaintif daripada haknya untuk mengemukakan keterangan atau menghujahkan atas apa-apa isu yang timbul dalam prosiding adjudikasi; (c) pengadil telah menimbangkan dan menolak tiga hujahan tersebut; dan (d) jikalau pun pengadil telah melanggar peraturan kedua keadilan asasi, tiada keterangan bahawa pelanggaran tersebut adalah muktamad atau material kepada AD yang memerlukan mahkamah untuk mengetepikan KA selaras dengan s 15(b) Akta. Oleh itu, mahkamah tidak boleh membenarkan SP tersebut dibawah s 15(b) Akta (lihat perenggan 20–22).

(4) Berdasarkan tuntutan pembayaran defendan dan tuntutan adjudikasi, pengadil telah melampaui bidangkuasanya dibawah s 27(1) dibaca bersama ss 5(1) dan 15(d) Akta dengan memberi awad terhadap jumlah faedah pra-KA keempat. Pengadil telah memberikan jumlah faedah pra-KA pertama hingga ketiga. Satu awad untuk jumlah faedah keempat pra-KA oleh pengadil akan menyebabkan kekayaan tidak adil defendan (lihat perenggan 29).

(5) Dalam keadaan dua permohonan akan diputuskan secara bersama oleh mahkamah, iaitu permohonan untuk menguatkuasakan KA dibawah s 28 Akta dan permohonan untuk mengetepikan KA selaras dengan s 15 Akta, mahkamah mempunyai kuasa untuk membuat satu perintah untuk menguatkuasakan hanya sebahagian daripada KA, yang mana mahkamah akan menukar KA agar hanya melaksanakan sebahagian daripada KA dan dalam keadaan tersebut, mahkamah harus menolok

permohonan untuk mengetepikan. Dalam keadaan yang mana mahkamah hanya mengendalikan permohonan untuk mengetepikan KA, mahkamah tiada kuasa untuk mengetepikan sebahagian daripada AD dibawah s 15, sekiranya parlimen berniat untuk mahkamah mempunyai kuasa untuk mengubah atau mengetepikan KA, parlimen akan menyatakan secara nyata kuasa tersebut dibawah s 15 (lihat perenggan 25 & 27–38).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Estar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723, CA (refd)

BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd and another case [2016] MLJU 1567; [2016] 1 LNS 1096, HC (refd)

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941; [2015] 8 CLJ 728, HC (refd)

Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732; [2016] 5 CLJ 882, HC (refd)

Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd [2017] MLJU 546, HC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2019] MLJU 742; [2019] 5 AMR 516, FC (refd)

PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits [2017] MLJU 905, HC (refd)

Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)

Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)

Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia [2017] MLJU 673; [2017] 4 AMR 477, HC (refd)

Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application [2017] MLJU 633; [2017] 4 AMR 501, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)

YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632, HC (refd)

Legislation referred to

Building and Construction Industry Security of Payment Act [SG]
Building and Construction Industry Security of Payment Act 1999 [AUS]
Building and Construction Industry Security of Payment Act 2002 [AUS]
Construction Contracts Act 2002 [NZ]

Construction Industry Payment and Adjudication Act 2012 ss 5, 5(1), 6, 6(1), 8(3), 9, 10, 10(1), 12(2)(a), (2)(b), (2)(c), (7), (9), 13, 13(a), (b), (c), 15, 15(a), (b), (c), (d), 25, 25(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), 27, 27(1), (2), 28, 28(1), (2)
Evidence Act 1950
Housing Grants, Construction and Regeneration Act 1996 [UK]
Rules of Court 2012 O 92 r 4
Scheme for Construction Contracts (England and Wales) Regulations 1998 [UK]

Andrew Raj Davis (Andrew Davis & Co) for the plaintiff.
Adi Farris bin Abdul Murad (Zain Megat & Murad) for the defendant.

Wong Kian Kheong J:

A. INTRODUCTION

[1] The plaintiff company ('the plaintiff') has filed this originating summons ('this OS') against the defendant company ('the defendant') to set aside an adjudication decision made on 5 April 2019 ('AD') by the adjudicator, Encik Aniz Ahmad Amirudin ('adjudicator').

B. ISSUES

[2] This OS raises the following five questions:

(1) in view of s 15(a)–(d) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), can the court set aside the AD under O 92 r 4 of the Rules of Court 2012 ('the RC'), the court's inherent jurisdiction and/or inherent power?

(2) whether the adjudicator had acted independently and/or impartially under s 15(c) of the CIPAA when:

(a) the adjudicator had accepted the defendant's bare averment that the plaintiff's failure to schedule the work of subcontractors had caused the defendant's non-completion of the works;

(b) the adjudicator had decided that the plaintiff was not entitled to deduct 'agreed back charges' ('back charges') despite the fact that the plaintiff had produced an invoice and two delivery receipts to support the back charges; and

(c) the adjudicator had held that the plaintiff was not entitled to withhold the performance bond and the retention sums despite the defendant's failure to complete the works and the defects in the defendant's works;

(3) was there a denial of natural justice under s 15(b) of the CIPAA premised on

any one or more of the grounds stated in the above sub-paras (2)(a)–(c)?

(4) whether the adjudicator had exceeded his jurisdiction within the meaning of s 15(d) read with s 27(1) of the CIPAA when the adjudicator:

(a) had decided in the manner stated in the above sub-paras (2)(a)–(c); and/or

(b) awarded multiple pre-AD interest under s 25(o) of the CIPAA as follows:

(i) interest at the rate of 5%pa on a sum of RM180,844.05 from 6 July 2018–5 April 2019 ('first pre-AD interest sum');

(ii) interest at the rate of 5%pa on an amount of RM93,713.40 from 29 August 2018–5 April 2019 ('second pre-AD interest sum');

(iii) interest at the rate of 5%pa on a sum of RM118,092.26 from 11 September 2018–5 April 2019 (first pre-AD interest sum); and

(iv) interest at the rate of 5%pa on an amount of RM392,649.71 ('adjudicated amount') from 6 April 2018 until full payment of the adjudicated amount ('fourth pre-AD interest sum'); and

(5) if the adjudicator has exceeded his jurisdiction by awarding the fourth pre-AD interest sum, whether the court has the power under s 15 of the CIPAA to:

(a) vary the AD (by excluding the fourth pre-AD interest sum); or

(b) sever the fourth pre-AD interest sum from the AD and set aside only the fourth pre-AD interest sum.

My resolution of the fifth issue in this OS entails a plea for an amendment to s 15 of the CIPAA.

C. BACKGROUND

[3] The plaintiff was the main contractor of a construction project ('project').

[4] By a 'letter of appointment' dated 2 March 2015, the plaintiff appointed the defendant as the 'nominated subcontractor' for certain works in the project ('subcontract works').

[5] There was a dispute between the plaintiff and defendant regarding the subcontract works. Hence, the defendant initiated adjudication proceedings against the plaintiff.

[6] After conducting the adjudication, the adjudicator delivered the AD as follows, among others:

(a) the plaintiff shall pay the adjudicated amount to the defendant; and

(b) the first to fourth pre-AD interest sums were awarded.

[7] The defendant filed an ex parte Originating Summons No BA-24C-48–04 of 2019 ('OS No 48') and applied for an ex parte order under s 28(1) of the CIPAA to enforce the AD (including an enforcement of the fourth pre-AD interest sum).

[8] In OS No 48, Azizah bt Nawawi J (as she then was) gave an ex parte order ('ex parte enforcement order') for the defendant to enforce the AD (including an enforcement of the foruth pre-AD interest sum).

[9] The plaintiff applied to intervene in OS No 48 and to set aside the ex parte enforcement order ('the plaintiff's application').

[10] Upon the elevation of Azizah bt Nawawi J to the Court of Appeal, the plaintiff's application was heard by me.

[11] Both the plaintiff and defendant consented to the following order in the plaintiff's application:

(a) the plaintiff was allowed to intervene in OS No 48; and

(b) the ex parte enforcement order was set aside.

D. THE COURT'S POWER TO SET ASIDE AD

[12] I reproduce below ss 13, 15 and 25 of the CIPAA as well as O 92 r 4 of the RC:

> CIPAA
>
> 13 *Effect of adjudication decision*
>
> *The adjudication decision is binding unless —*
>
> (a) *it is set aside by the High Court on any of the grounds referred to in section 15*;
>
> (b) the subject matter of the decision is settled by a written agreement between the parties; or
>
> (c) *the dispute is finally decided by arbitration or the court.*
>
> 15 *Improperly procured adjudication decision*
>
> *An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:*

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) *there has been a denial of natural justice;*

(c) *the adjudicator has not acted independently or impartially;* or

(d) *the adjudicator has acted in excess of his jurisdiction.*

25 *Powers of the adjudicator*

The adjudicator shall have the powers to —

(a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;

(b) order the discovery and production of documents;

(c) set deadlines for the production of documents;

(d) draw on his own knowledge and expertise;

(e) appoint independent experts to inquire and report on specific matters with the consent of the parties;

(f) call for meetings with the parties;

(g) conduct any hearing and limiting the hearing time;

(h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(j) issue any direction as may be necessary or expedient;

(k) order interrogatories to be answered;

(l) order that any evidence be given on oath;

(m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

(n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

(o) *award* financing costs and *interest*; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.

RC

O 92 r 4 *Inherent powers of the Court*

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may

be necessary to prevent injustice or to prevent an abuse of the process of the Court. (Emphasis added.)

[13] The plaintiff's learned counsel has relied on s 15(b)–(d) of the CIPAA and O 92 r 4 of the RC to support this OS.

[14] My understanding of the court's power to set aside an AD is as follows:

(1) the CIPAA does not provide a right to any party to an AD to appeal against the AD;

(2) an AD is provisional under s 13(a)–(c) of the CIPAA and may be set aside by the High Court pursuant to any of the paragraphs in s 15(a)–(d) of the CIPAA ('setting aside application'). A setting aside application is not an appeal to the High Court against the AD. Nor is a setting aside application a judicial review of the AD. Hence, the High Court cannot review the merits of an AD in a setting aside application — please see the Court of Appeal's judgment delivered by David Wong Dak Wah JCA (as he then was) in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 at para [21];

(3) the High Court can only set aside an AD under any of the grounds provided in s 15(a)–(d) of the CIPAA. There cannot be any resort to O 92 r 4 of the RC, the court's inherent jurisdiction and/or inherent power in light of the specific provision in s 15(a)–(d) of the CIPAA. The following decisions of our apex court have decided that the court cannot apply O 92 r 4 of the RC, the court's inherent jurisdiction and/or inherent power to decide a matter when there is an express provision of written law which provides for the matter:

   (a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 at p 181; and

   (b) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 at p 320;

(4) the court cannot set aside an AD merely because:

   (a) an error of law has been committed by an adjudicator unless the adjudicator has answered a 'wrong' question of law (which does not arise from the dispute to be adjudicated upon) — please see the judgment of Lee Swee Seng J (as he then was) in the High Court in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882 at para [71];

   (b) an adjudicator has interpreted erroneously a provision in the

construction contract — *Econpile* at para [67];

(c) relevant evidence has been excluded wrongly by an adjudicator;

(d) an adjudicator has admitted improperly irrelevant evidence;

(e) an adjudicator has failed to attach weight to relevant evidence, oral or documentary;

(f) undue weight has been given by an adjudicator to any piece of evidence;

(g) an adjudicator has assessed erroneously the evidence presented to the adjudicator;

(h) documentary evidence has been misconstrued by an adjudicator;

(i) a plain error regarding a finding of fact has been made by an adjudicator;

(j) an adjudicator has omitted to make a finding of fact which can be adequately supported by evidence;

(k) an erroneous finding of mixed fact and law has been arrived at by an adjudicator — please see Lee Swee Seng J's decision in the High Court in *Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] MLJU 673; [2017] 4 AMR 477 at para [60];

(l) an adjudicator has drawn a wrong inference from the evidence; and

(m) an adjudicator has omitted to make the right inference from the evidence.

The above errors and omission by an adjudicator may be rectified by an arbitration or litigation regarding the dispute in question (as provided in s 13(c) of the CIPAA) — *Econpile* at para [67];

(5) in deciding a setting aside application, the following considerations are pertinent:

(a) the Long Title to the CIPAA states that the CIPAA is to 'facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry'. In the Federal Court case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742; [2019] 5 AMR 516 at para [51], Mohd Zawawi Salleh FCJ has explained that one of the purposes of CIPAA is to ensure that contractors and subcontractors are not deprived of cash flow which is the life-blood of the construction industry ('purpose (CIPAA)');

(b) an adjudication is conducted under a specific time frame as stipulated in s 12(2)(a)–(c) of the CIPAA. This is understandable in

view of the purpose (CIPAA). Hence, the adjudicator and the contesting parties do not have the luxury of time;

(c) Evidence Act 1950 ('the EA') does not apply in adjudication proceedings — please see s 12(9) of the CIPAA;

(d) an adjudicator has powers under s 25(a)–(p) of the CIPAA in the conduct of adjudications which are wider than the powers conferred by the EA on courts to decide suits; and

(e) parties in an adjudication may represent themselves under s 8(3) of the CIPAA and need not be represented by lawyers; and

(6) a party applying to set aside an AD, has the burden to satisfy the court regarding the application of any of the paragraphs in s 15(a)–(d) of the CIPAA.

E. HAD THE ADJUDICATOR ACTED INDEPENDENTLY AND/OR IMPARTIALLY?

[15] The plaintiff's learned counsel has advanced the following three contentions ('three contentions') to persuade this court that the adjudicator has failed to act independently and/or impartially under s 15(c) of the CIPAA:

(a) the adjudicator had decided that the defendant's non-completion of the subcontract works was caused by the plaintiff's failure to schedule the work of the other subcontractors. However, such a decision, according to the plaintiff, is not substantiated by any documentary document;

(b) the adjudicator did not allow the plaintiff to deduct the back charges despite the fact that the back charges were supported by an invoice and two delivery receipts; and

(c) the adjudicator had held that the plaintiff was not entitled to withhold the performance bond and the retention sums despite the defendant's failure to complete the subcontract works and the fact that the defendant's subcontract works were defective.

[16] I am of the following view regarding s 15(c) of the CIPAA:

(a) s 15(c) of the CIPAA has two limbs ('two limbs'), namely:

(i) the adjudicator has not acted independently ('first limb'); and

(ii) the adjudicator has failed to act impartially ('second limb').

There are two limbs because the Legislature has employed a disjunctive term 'or' in s 15(c) of the CIPAA;

(b) the first limb may overlap with the second limb — please see the opinion of Mr Lam Wai Loon and Mr Ivan YF Loo in *Construction Adjudication in*

Malaysia (2nd Ed, 2018) at [15.081]; and

(c) to substantiate the first and/or second limb, a party applying to set aside an AD must adduce evidence which shows a lack of independence or a lack of impartiality on the adjudicator's part regarding the hearing and delivery of an AD — please see the judgment of Lee Swee Seng J in the High Court case of *Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application* [2017] MLJU 633; [2017] 4 AMR 501 at para [39].

[17] Firstly, I am not able to accept the three contentions to set aside the AD under s 15(c) of the CIPAA because:

(a) to accede to the three contentions, would be tantamount to a review of the merits of the AD and this is not permitted in a setting aside application — please see the above sub-para 14(2); and

(b) if the plaintiff can rely on the three contentions in this OS, this OS will be wrongly converted to an appeal or rehearing of the merits of the dispute before the adjudicator — please see the decision of Ravinthran Paramaguru J (as he then was) in the High Court in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941; [2015] 8 CLJ 728 at para [9].

[18] Secondly, I have no hesitation to decide that the three contentions do not amount to any proof of the two limbs in this case. This is because the three contentions do not show that the adjudicator is not independent or is biased in the conduct of the adjudication and the delivery of the AD — please see *Teguh Wiramas*.

[19] As explained in the above paras 17–18, I dismiss the plaintiff's reliance on s 15(c) of the CIPAA to support this OS.

F. WAS THERE A DENIAL OF NATURAL JUSTICE BY THE ADJUDICATOR?

[20] My understanding of the relevant cases regarding s 15(b) of the CIPAA is as follows:

(a) in United Kingdom's ('UK') Court of Appeal case of *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723, at paras [14]–[16], Dyson LJ (as he then was) decided that there are two rules of natural justice which apply to adjudicators under UK's Housing Grants, Construction and Regeneration Act 1996 ('the HGCR (UK)') as follows:

(i) an adjudicator must be unbiased ('first rule of natural justice'); and

(ii) all parties have a right to prior notice and an effective opportunity to make representation before an adjudicator makes an AD ('second rule of natural justice');

(b) the second rule of natural justice concerns procedural fairness — please see *ACFM Engineering & Construction* at para [19]. Whether the second rule of natural justice has been complied with or not, depends on whether a party has been prevented from tendering evidence or to make a submission regarding any issue which has been raised in an adjudication — *ACFM Engineering & Construction* at para [20];

(c) the second rule of natural justice may be breached if an adjudicator has failed to consider a relevant defence. In *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479 at paras [65]–[66] and [74], Zulkefli PCA delivered the following judgment of the Federal Court:

> [65] *We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) *which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading.* At [24–28] the learned judge observed:
>
> > 24. *It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer's defence by reference to the over-payment on batches 1–25.* ...
>
> [66] *Based on the above decision of Pilon Ltd the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s 27(1) of the CIPAA in refusing to consider all the defences raised in the adjudication response. Therefore such a decision by the adjudicator cannot stand.*
>
> ...
>
> [74] *For the reasons above stated, it is our considered view that an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s 6 of the CIPAA or not. In the circumstances of this case, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.* (Emphasis added.); and

(d) the breach of the second rule of natural justice must be 'decisive or of considerable potential importance to the outcome and not peripheral or irrelevant' to the adjudication — please see the judgment of Mary Lim Thiam Suan J (as she then was) in the High Court case of *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435, at para [82].

[21] I am of the view that the plaintiff has not proven that the adjudicator has breached the first and/or second rule of natural justice. This decision is premised on the following reasons:

(a) the plaintiff had not adduced any evidence of bias on the part of the adjudicator. As such, the adjudicator had not breached the first rule of natural justice;

(b) before making the AD, the adjudicator had not deprived the plaintiff of its right to adduce evidence and to submit on any issue which arose in the adjudication proceedings — *ACFM Engineering & Construction*. The adjudicator has not therefore contravened the second rule of natural justice;

(c) the adjudicator had considered and rejected the three contentions. As such, the plaintiff cannot rely on *View Esteem* to allege that the adjudicator has breached the second rule of natural justice in this case; and

(d) even if it is assumed that the adjudicator has breached the second rule of natural justice, there is no evidence that such a breach is 'decisive' or 'material' to the AD which warrants the court to set aside the AD pursuant to s 15(b) of the CIPAA — please see *Ranhill*.

[22] For the reasons stated in the above para 21, I cannot allow this OS under s 15(b) of the CIPAA.

G. APPLICATION OF S 15(D) OF THE CIPAA

[23] Sections 5, 6, 9, 10 and 27 of the CIPAA provide as follows:

5 Payment claim

(1) *An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.*

(2) *The payment claim shall be in writing and shall include —*

(a) *the amount claimed and due date for payment of the amount claimed;*

(b) *details to identify the cause of action including the provision in the construction contract to which the payment relates;*

(c) *description of the work or services to which the payment relates; and*

(d) *a statement that it is made under this Act.*

6 Payment response

(1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.

(2) *A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.*

(3) *A payment response issued under subsection (1) or (2) shall be served on the unpaid party* within ten working days of the receipt of the payment claim.

(4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

9 Adjudication claim

(1) *The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.*

(2) *The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1).*

10 Adjudication response

(1) *The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.*

(2) *The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).*

(3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1).

27 Jurisdiction of adjudicator

(1) *Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.*

(2) *The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.*

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1). (Emphasis added.)

[24] In *View Esteem* at paras [12] and [15]–[17], Zulkefli PCA explained the

scope of s 15(d) of the CIPAA as follows:

> [12] *With respect, we are of the view that the Court of Appeal was wrong as it failed to distinguish between a case where CIPAA did not apply at all and a case where CIPAA applies but the adjudicator acting under CIPAA had exceeded his jurisdiction. Section 15 of the CIPAA relates to the latter. Section 15 is predicated on CIPAA applying to the case and to an adjudication decision made under CIPAA. It relates specifically to a complaint that the adjudicator had 'acted in excess of his jurisdiction' presupposing the existence of the adjudicator's jurisdiction under CIPAA in the first place.*
>
> ...
>
> [15] *We are of the view in substance, the 'jurisdiction' spoken of in s 15(d) of the CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction. Thus, by s 27(2) of the CIPAA the parties may by consent extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. This is possible only if the term 'jurisdiction' is used in the sense of CIPAA being applicable in the first place.*
>
> [16] *The term 'jurisdiction' under CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of CIPAA. On this point, in Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd & Other Case* [2017] MLJU 242; [2017] 1 LNS 177*, Lee Swee Seng J observed as follows (at [70]):*
>
> > *In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in s 15(d) as in the adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an adjudication decision. It is also used in s 27(1) with respect to an adjudicator's jurisdiction being limited to the matters raised in the payment claim and the payment response. Then there is a reference to it in s 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response. ...*
>
> [17] *The learned judge also made note of the various types of jurisdictional complaints within CIPAA which may be categorised as core jurisdiction, competence jurisdiction and contingent jurisdiction. The common feature in all of them is the presupposition that CIPAA applies to determine if the adjudicator had kept within his jurisdiction.* (Emphasis added.)

G(1). Whether the adjudicator exceeded jurisdiction regarding three contentions

[25] The three contentions had been expressly raised in the plaintiff's 'payment response' dated 23 October 2018 (made under s 6(1) of the CIPAA) and 'adjudication response' dated 31 December 2018 (filed pursuant to s 10(1) of the CIPAA). Based on *View Esteem*, the three contentions are well within the adjudicator's jurisdiction as provided in s 27(1) of the CIPAA. Accordingly, I reject the plaintiff's reliance on the three contentions to support this OS premised on s 15(d) of the CIPAA.

G(2). Did the adjudicator exceed jurisdiction by awarding fourth pre-AD interest sum?

[26] The defendant had claimed for the first to third pre-AD interest sums as follows:

(1) para 5 of the defendant's 'payment claim' dated 9 October 2018 (made under s 5(1) of the CIPAA); and

(2) in the defendant's 'adjudication claim' dated 14 December 2018 (filed pursuant to s 10(1) of the CIPAA), the defendant sought, among others, the following interest sums:

(i) the first to third pre-AD interest sums — please see sub-para 68.2 of the adjudication claim; and

(ii) 'post-AD' interest on the adjudicated amount from the date of AD until full payment of the adjudicated amount ('post-AD interest claim').

[27] It is to be noted that the defendant has not claimed for the fourth pre-AD interest sum in its payment claim and adjudication claim. Furthermore, the plaintiff and defendant had not agreed in writing to extend the adjudicator's jurisdiction under s 27(2) of the CIPAA to include the fourth pre-AD interest sum.

[28] It is not disputed that an adjudicator has the power under s 25(o) of the CIPAA to grant pre-AD interest and post-AD interest in an AD. Such a power pursuant to s 25(o) of the CIPAA must be exercised in accordance with s 27(1) read with s 5(1) of the CIPAA, namely the adjudicator can only have jurisdiction to give pre-AD interest and post-AD interest as claimed in the payment claim. If otherwise, an adjudicator may award pre-AD interest which has not been claimed for in a payment claim and this will then result in an unjust enrichment of the party in whose favour the AD is made.

[29] Based on the defendant's payment claim and adjudication claim, I am of the view that the adjudicator has exceeded his jurisdiction under s 27(1) read with ss 5(1) and 15(d) of the CIPAA by awarding the fourth Pre-AD interest sum. The adjudicator had already granted the first to third Pre-AD interest sums. An award of the fourth pre-AD interest sum by the adjudicator, will result in an unjust enrichment of the defendant.

[30] I have not overlooked the possibility that the adjudicator has made a computational or typographical error in granting the fourth pre-AD interest sum ('adjudicator's computational/typographical error'). If there is an adjudicator's computational/typographical error, s 12(7) of the CIPAA may be invoked. Section 12(7) of the CIPAA provides as follows:

> 12(7) *The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.* (Emphasis added.)

[31] I am not able to find that there has been an adjudicator's computational/typographical error in this case because:

(a) sub-paras 33(ii) and (iv) of the AD had expressly referred to the defendant's claim for the first to third pre-AD interest sums and post-AD interest claim. It is clear that the adjudicator has actual knowledge that the defendant is not claiming for the fourth pre-AD interest sum in this case;

(b) the adjudicator had given the first to third pre-AD interest sums in paras 136–137 and 146(c) of the AD. However, the adjudicator had also granted the fourth pre-AD interest sum in paras 138 and 146(d) of the AD. It is unlikely that an adjudicator's computational/typographical error has been committed when the adjudicator has expressly referred to the fourth pre-AD interest sum in the AD, not once but twice; and

(c) the adjudicator did not correct the fourth pre-AD interest sum on the adjudicator's 'own initiative' under s 12(7) of the CIPAA.

[32] The defendant could have applied to the adjudicator under s 12(7) of the CIPAA to correct the fourth pre-AD interest sum but did not do so. In fact, the defendant capitalised on the fourth pre-AD interest sum as follows:

(a) based on the AD, the defendant's solicitors sent a letter dated 11 April 2019 to the plaintiff's solicitors which demanded the plaintiff to pay a sum of RM454,126.96 ('demanded sum') to the defendant. The demanded sum included the fourth pre-AD interest sum;

(b) OS No 48 was filed by the defendant based on, among others, the fourth pre-AD interest sum;

(c) para 11 of the defendant's affidavit in support of OS No 48 (affirmed by the defendant's managing director, Encik Mohd Hashim bin Abdullah) had relied on the fourth pre-AD interest sum; and

(d) the ex parte enforcement order allowed the defendant to enforce, among others, the fourth pre-AD interest sum. If the plaintiff had not applied to intervene in OS No 48 and set aside the ex parte enforcement order, the plaintiff would have been entitled to enforce the fourth pre-AD interest sum.

H. WHETHER THE COURT CAN VARY AD OR SEVER FOURTH PRE-AD INTEREST SUM FROM AD

[33] Section 28(1) and (2) of the CIPAA provide as follows:

28 *Enforcement of adjudication decision as judgment*

(1) *A party may enforce an adjudication decision by applying to the High Court*

for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

(2) *The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.* (Emphasis added.)

[34] The question that arises is whether the court has the power under s 15 of the CIPAA to:

(a) vary the AD by excluding the fourth pre-AD interest sum; or

(b) sever the fourth pre-AD interest sum from the AD and set aside only the fourth pre-AD interest sum.

[35] Firstly, I am of the view that the above issue has to be resolved in the context of two scenarios as follows:

(a) in the first scenario, there are two applications to be decided together by the court, namely an application to enforce an AD under s 28 of the CIPAA and an application to set aside an AD pursuant to s 15 of the CIPAA ('first scenario'); and

(b) the second scenario ('second scenario') concerns a setting aside application only (such as in this case).

[36] Secondly, cases from UK, New Zealand, Singapore, the states of New South Wales and Victoria in Australia, have to be read with caution because there is no provision in the legislation of those countries ('foreign legislation') for the court to set aside an AD. I refer to the foreign legislation as follows:

(a) the HGCR (UK) and the Scheme for Construction Contracts (England and Wales) Regulations 1998;

(b) the Construction Contracts Act 2002 of New Zealand;

(c) Singapore's Building and Construction Industry Security of Payment Act;

(d) the Building and Construction Industry Security of Payment Act 1999 of New South Wales; and

(e) Victoria's Building and Construction Industry Security of Payment Act 2002.

[37] I am of the following view regarding the first scenario:

(1) the court has the power under s 28(2) of the CIPAA (*the High Court may make an order in respect of the adjudication decision either wholly or partly*) to enforce only a part of an AD. In this sense, the court varies an AD or severs the

AD so as to enforce only a part of the AD.

The following cases demonstrate the court's power under s 28(2) of the CIPAA to sever an AD so as to enforce only a part of the AD:

(a) Lee Swee Seng J's judgments in the High Court in:

(i) *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications* [2017] MLJU 632 at paras [52]–[55]; and

(ii) *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits* [2017] MLJU 905 at paras [88]–[89] and [91]–[94];

(b) the decision of Lim Chong Fong J in *Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd* [2017] MLJU 546 at para [17]; and

(2) if the court decides to enforce an AD under s 28(2) of the CIPAA, either wholly or partially, the court must dismiss the setting aside application. In such circumstances, the question of varying the AD or setting aside only a part of the AD, does not arise.

[38] Regarding the second scenario (as in this OS), I am of the diffident view that the court has no power to set aside a part of the AD under s 15 of the CIPAA. I rely on Lee Swee Seng J's judgment in the High Court case of *BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd and another case* [2016] MLJU 1567; [2016] 1 LNS 1096 at para [70]. If Parliament had intended for the court to have power under s 15 of the CIPAA to vary an AD or to set aside a part of an AD, Parliament would have expressly provided for such a power in s 15 of the CIPAA along the lines of s 28(2) of the CIPAA. The Legislature however did not do so.

[39] The learned authors of *Construction Adjudication in Malaysia* (2nd Ed, 2018), at [15.162]–[15.163], have opined that the court has the power to set aside a part of an AD in cases where the adjudicators have exceeded their jurisdiction or have breached rules of natural justice ('opinion'). This opinion has relied on *Syarikat Bina Darul Aman*, *YTK Engineering Services*, *PCP Construction* and *Harmony Teamwork Construction*. With respect, I beg to differ for the following reasons:

(a) as explained in the above para 38, the court has no power to set aside a part of an AD; and

(b) the material facts of *YTK Engineering Services*, *PCP Construction* and *Harmony Teamwork Construction* concern the court's wide powers under s 28(2) of the CIPAA — please see the above sub-para 37(1).

[40] In *Syarikat Bina Darul Aman* at para [12], the adjudicator has dismissed the plaintiff's adjudication claim *in toto*. The plaintiff applied in *Syarikat Bina*

Darul Aman to set aside the AD and sought an order that the plaintiff was entitled to recommence adjudication proceedings before a new adjudicator. Lee Swee Seng J decided as follows in *Syarikat Bina Darul Aman* at paras [87]–[90]:

> [87] *As this is a case where the adjudicator had erroneously held that he had no jurisdiction under the CIPAA to hear the payment claim, this court is at liberty to interfere with the decision made as it is a decision that goes towards jurisdiction. Not to hear a dispute submitted for his adjudication is equally a breach of natural justice for the adjudicator did not hear the parties at all.*
>
> [88] *As this head of claim in claim No 4 is severable from claim Nos 3 and 4 which had been decided on merits and for which I would not interfere, I may set aside that part of the decision that is affected.*
>
> *Pronouncement*
>
> [89] *For the reasons given, I had set aside only the part of the adjudication decision wherein the adjudicator had dismissed claim No.4 with respect to the 'loss and expense claim'.*
>
> [90] *The plaintiff/claimant shall be entitled to re-commence adjudication proceedings on claim No 4 only from the notice of adjudication dated March 25, 2016 with a new adjudicator to be appointed by the Director of KLRCA.* (Emphasis added.)

There is no discussion in *Syarikat Bina Darul Aman* on whether the court is empowered under s 15 of the CIPAA to set aside a part of an AD. Lee Swee Seng J has decided in an earlier case, *BM City Realty & Construction*, that the court has no power to sever an AD pursuant to s 15 of the CIPAA.

[41] Premised on the above reasons, I am constrained to set aside the entire AD under s 15(d) of the CIPAA because the adjudicator has exceeded his jurisdiction by granting the fourth pre-AD interest sum.

I. THE COURT'S DECISION

[42] Regrettably, this OS is allowed with costs on the sole ground that the adjudicator has exceeded his jurisdiction under s 27(1) read with s 5(1) of the CIPAA by awarding the fourth pre-AD interest sum and the court has no power pursuant to s 15 of the CIPAA to:

(a) vary the AD (to exclude the fourth pre-AD interest sum); or

(b) set aside only the fourth pre-AD interest sum.

J. A PLEA FOR REFORM

[43] It is my earnest hope that Parliament may consider amending s 15 of the CIPAA to provide the court with the power to vary an AD or to set aside a part of an AD in the interest of justice (such as in this case).

Originating summons allowed.

Reported by Izzat Fauzan